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TAN SRI DR MUHAMMAD SHAFEE ABDULLAH v. TOMMY THOMAS & ORS

HIGH COURT MALAYA, KUALA LUMPUR
HANIPAH FARIKULLAH J
[CIVIL SUIT NO: 22NCVC-127-03-2015]
B 2 SEPTEMBER 2016

LEGAL PROFESSION: *Malaysian Bar – Misconduct of an advocate and solicitor – Allegation of – Motion against advocate and solicitor (plaintiff) published on website of Malaysian Bar – Whether there was blatant attack on actions and* C *character of plaintiff in his capacity as an ad hoc Deputy Public Prosecutor – Whether words defamatory of plaintiff – Claim for injunction restraining defendants from moving motion on Bar Council's future Annual General Meetings – Whether President of Malaysian Bar wrongly joined and sued as party to action – Whether members of Malaysian Bar ought to be able to express opinion on plaintiff's conduct* D *– Whether there was impact on integrity and dignity of Public Prosecutor's office – Defence of justification – Whether arose – Whether defendants had interest or duty to submit motion – Whether defendants entitled to rely on defence of qualified privilege – Whether subject matter of motion a genuine matter of public interest – Whether defence of fair comment applied – Whether defendants acted in breach of* E *statutory duty – Whether motion ultra vires – Legal Profession Act 1976, ss. 41, 47, 56, 57 & 64(6)*

TORT: *Defamation – Misconduct advocate and solicitor – Allegation of – Motion against advocate and solicitor (plaintiff) published on website of Malaysian Bar – Whether there was blatant attack on actions and character of plaintiff in his* F *capacity as an ad hoc Deputy Public Prosecutor – Whether words defamatory of plaintiff – Claim for injunction restraining defendants from moving motion on Bar Council's future Annual General Meetings – Whether President of Malaysian Bar wrongly joined and sued as party to action – Whether members of Malaysian Bar ought to be able to express opinion on plaintiff's conduct – Whether there was* G *impact on integrity and dignity of Public Prosecutor's office – Defence of justification – Whether arose – Whether defendants had interest or duty to submit motion – Whether defendants entitled to rely on defence of qualified privilege – Whether subject matter of motion a genuine matter of public interest – Whether defence of fair comment applied – Whether defendants acted in breach of statutory* H *duty – Whether motion ultra vires – Legal Profession Act 1976, ss. 41, 47, 56, 57 & 64(6)*

The plaintiff, a senior advocate and solicitor of the High Court of Malaya, a member of the Malaysian Bar ('third defendant') and an ad hoc Deputy Public Prosecutor, was statutorily appointed to represent the Public I Prosecutor in a sodomy case involving Dato' Seri Anwar Ibrahim ('DSAI') at the Federal Court (Sodomy II case). This action was brought in respect of

the motion titled "Motion against Shafee Abdullah" ('the motion') which was published by the Malaysian Bar ('third defendant') on its website. The plaintiff's cause of action against the defendants were, *inter alia* (i) an injunction restraining the defendants from moving the said motion on future Annual General Meetings and Extraordinary General Meetings of the third defendant; (ii) for a declaration that the said motion seeking the third defendant and the President of the Bar Council of Malaysia ('fourth defendant') to condemn and reprimand the plaintiff was *ultra vires* the Legal Profession Act 1976 ('LPA'); (iii) for a declaration that the said motion was *ultra vires* as it meant to move the defendants to act beyond their statutory power under the LPA thus amounting to a breach of statutory duty; (iv) for a declaration that the said motion if adopted by the third and fourth defendants was *ultra vires* and a breach of natural justice and the right to a fair hearing[and (v) for a declaration that the said motion to move the third and the fourth defendants during the said AGM was *mala fide*, politically motivated and would breach the plaintiff's constitutional rights under the Federal Constitution ('FC'), in particular, and *inter alia* arts. 5 and 8 of the FC. This case was primarily concerned with the conduct of the plaintiff in his capacity as an advocate and solicitor and was essentially related to what the plaintiff said as an advocate and solicitor at the Kelana Jaya Talk which was recorded in a video and later formed an agreed transcript ('the transcript') and also what the plaintiff said after the judgment of the Federal Court in the Sodomy II case. The first defendant ('the proposer') seconded by the second defendant, had published and submitted the said motion to the secretary of the third defendant to discuss in the 69th Annual General Meeting of the third defendant ('the said AGM'), the alleged misconduct of the plaintiff after DSAI's appeal at the Federal Court in "Sodomy II" case. The plaintiff alleged that the third and fourth defendant cause to be published the said motion in its entirety with all its intended defamatory meaning on their website which could be accessed by any member of the third and fourth defendant. The issues that arose for determination were (i) whether the words were defamatory; (ii) whether the fourth defendant had been rightly joined and sued; (iii) whether the defence of justification, qualified privilege and fair comment could be applied; (iv) whether the defendants acted in breach of statutory duty; and (v) whether the motion was *ultra vires* of the LPA.

Held (dismissing plaintiff's claim)

(1) Looking at the motion as a whole, there was a blatant attack on the actions and character of the plaintiff, especially in his capacity as an advocate and solicitor acting as an ad hoc DPP, allegedly having breached the rules of the LPA. The natural and ordinary meaning of the motion clearly implied that the plaintiff was unethical and not an honest lawyer, had no integrity and honour and behaved in a repugnant and

obnoxious manner which had brought the legal profession into disrepute. It was stated in the motion that the plaintiff had demeaned the accused, his legal team and the defences that were relied upon by the accused in the Sodomy II case and that the plaintiff was not independent, and politically motivated and was an agent of a ruling political party, hired to secure the conviction of the said case. The words complained of did indeed bear those meanings. A reasonable person reading the impugned statements in question would draw the inference that the plaintiff was unfit for his profession. Therefore, certain words used in the motion were defamatory of the plaintiff. (paras 29-30)

(2) The position of 'the President of the Bar Council' does not exist under the LPA. The plaintiff's action should have been directed against the Bar Council and not the fourth defendant in whatever capacity. The plaintiff's action was clearly against the wrong party. It was also necessary to take into account some of the relevant provisions in the LPA, namely ss. 41, 47, 56 and 57(j) of the LPA. Further, based on the decision in the case of *Mohamad Ramli Abdul Manan v. Lim Chee Wee (President of the Malaysian Bar)*, the plaintiff had wrongly joined the then President of the Malaysian Bar as a party. (paras 42-49)

(3) The plaintiff in his evidence had explained that the Kelana Jaya Talk was necessary to clear the political conspiracy theory on the Sodomy II case advanced by the defence. However, this court was of the view that there was no necessity for the plaintiff to defend the Federal Court's judgment given that it was clear that the Federal Court did not accept the accused's submissions in the Sodomy II case that there was a political conspiracy against him. The Federal Court's judgment stated that the defence of political conspiracy remained a mere allegation not substantiated by credible evidence. The evidence clearly showed that the Kelana Jaya Talk was organised by a political party. As an ad hoc DPP at the material time, the plaintiff should not align himself to a political party. (paras 74-79)

(4) The plaintiff had criticised the accused in the Sodomy II case by calling him a 'coward' and for not giving his DNA, despite acknowledging that the Federal Court did not do so in its judgment. Calling an accused a 'coward' could not in any way be described as a legal analysis of the law. It was a personal attack against a convicted prisoner. The plaintiff had further disclosed the *in camera* evidence at the Kelana Jaya Talk. The plaintiff had divulged to the public the evidence at the Sodomy II case that was expunged. The *in camera* order had not been set aside, nor declared null and void by any of the courts in the Sodomy II case. Thus, the plaintiff was accordingly bound to abide by the *in camera* order at all material times. The *in camera* evidence may have been openly read

out in the courts in the Sodomy II case but that did not give the plaintiff the right to divulge the *in camera* evidence at a public forum, in breach of the *in camera* order and his duties as an ad hoc Deputy Public Prosecutor and an advocate and solicitor. An order of the High Court with regards to the *in camera* evidence must be obeyed until it is reversed or set aside. (paras 82-91)

(5) The events after the public forum at the Kelana Jaya Talk showed that the plaintiff had received public criticisms before the first defendant presented the motion. The mover (the first defendant) and the seconder (the second defendant) of the motion were not alone. Their concerns were shared by some members of the public. On the defence of justification by the first and second defendant, there was substantial truth of what had happened at the Kelana Jaya talk as contended by the defendants. There was nothing out of the ordinary for a concerned member of the Malaysian Bar, like the first defendant and the second defendant, to express their opinion on the plaintiff's conduct, particularly when it was of such unprecedented nature, and had an impact on the integrity and dignity of the office of the Public Prosecutor. This court found in the first and second defendants' favour on the defence of justification. (paras 99-108)

(6) The first ingredient for the defence of qualified privilege was whether the occasion which caused the defendants to submit the motion and the subsequent publication of the same was a qualified occasion. The answer to this question, in turn, depended on whether the defendants had an interest or duty, legal or social or moral to submit the motion to the AGM. On the facts, the first defendant and the second defendant, a senior member of the Bar, had an interest to present the motion to the Malaysian Bar and the Malaysian Bar had an interest to receive it as it concerned the conduct of one of its members. Pursuant to s. 64(6) of the LPA, the third defendant and the fourth defendant (the Bar Council) had a duty to accept it. (paras 114-118)

(7) Even though the impugned statements in the motion were defamatory of the plaintiff, the first and second defendants were entitled to roll on the defence of qualified privilege. The defence of qualified privilege can only be defeated by proof of act and malice on the part of the defendant. The onus of proving such malice was on the plaintiff. The plaintiff had not discharged the onus. Thus, the defendants had established that the motion was made 'on an occasion where the person who makes a communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it'. As for the defence of fair comment, the subject matter of the motion was a genuine

matter of public interest. Furthermore, the sting of the defamation related to the effects of the plaintiff's conduct on the legal profession, the office of the public prosecutor and the administration of justice. (paras 129-134)

(8) The fact that the motion called upon in-coming Bar Council to lodge a complaint against the plaintiff with the Disciplinary Board clearly showed that the AGM was not the disciplinary authority and the disciplinary process did not take place at the AGM. The disciplinary proceeding process as enunciated by the LPA would only commence upon the lodgement of that complaint by the Disciplinary Board. Evidence clearly showed that the third and the fourth defendant (the Bar Council) were receiving the motion pursuant to s. 64(6) of the LPA which stipulates that any motion to be considered at the AGM of the Malaysian Bar shall be served on the secretary of the Malaysian Bar. The motion concerned the misconduct of an advocate and solicitor was different from suggesting that the motion was meant to discipline the plaintiff. If the motion sought to 'convict' and usurp the disciplinary powers of the Disciplinary Board, it would have been wholly unnecessary for the motion to call upon the in-coming Bar Council to immediately lodge a complaint against the plaintiff. (paras 152-156)

(9) Section 57 is a specific section that allows the Bar Council to take cognizance, *inter alia*, of the professional conduct of its member and to bring before any general meeting of the Malaysian Bar any matter which it considered material to the Malaysian Bar or to the interests of the profession and to make any recommendations and take any action as it considered fit in relation thereto. The evidence adduced during trial showed that the plaintiff's conduct was a concern to the members of the public. The third and fourth defendant had not acted *ultra vires* of the LPA and the plaintiff had failed to prove that the defendants had breached their statutory duties under the LPA. (paras 160, 161 & 163)

Case(s) referred to:

Abdul Rahman Talib v. Seenivasagam & Anor [1964] 1 LNS 2 HC ***(refd)***
Abdul Rahman Talib v. Seenivasagam & Anor [1966] 1 LNS 5 FC ***(refd)***
Adam v. Ward [1917] AC 309 ***(refd)***
Ayob Saud v. TS Sambanthamurthi [1989] 1 CLJ 152; [1989] 1 CLJ (Rep) 321 HC ***(refd)***
Bar Malaysia v. Index Continent Sdn Bhd [2016] 2 CLJ 545 FC ***(refd)***
Dato' Seri Anwar Ibrahim v. PP [2016] 6 CLJ 161 FC ***(refd)***
Dato' Seri Anwar Ibrahim v. PP & Another Appeal [2015] 2 CLJ 145 FC ***(refd)***
DP Vijandran v. Majlis Peguam [1996] 1 CLJ 23 CA ***(refd)***
DP Vijandran v. Majlis Peguam [1995] 2 CLJ 815 HC ***(refd)***
Goh Chok Tong v. Jeyaratnam Joshua Benjamin [1998] 3 SLR 337 ***(refd)***
Horrocks v. Lowe [1975] AC 135 ***(refd)***

Hughes v. Risbridger (sued as "Bill Risbridger") & Another [2010] EWHC 491 ***(refd)***
Isaacs v. Robertson [1985] 1 AC 97 ***(refd)***
Kearns v. General Council of the Bar [2003] 1 WLR 1357 ***(refd)***
Lembaga Tatatertib Peguam-peguam v. Hoo Lin Coln & Anor [2008] 4 CLJ 317 FC ***(refd)***
Lucas-Box v. News Group Newspapers Ltd [1986] 1 All ER 177 ***(refd)***
Majlis Peguam Malaysia & Ors v. Raja Segaran Krishnan & Other Appeals [2004] 4 CLJ 239 CA ***(refd)***
Mirror Newspapers Ltd v. World Hosts Pty Ltd [1979] 141 CLR 632 ***(refd)***
Mohamad Ramli Abdul Manan v. Lim Chee Wee [2014] 6 CLJ 168 CA ***(refd)***
Nagandran Kalianna Gaundar v. Melinda Alison Monteiro & Ors [2011] 1 LNS 466 HC ***(refd)***
Perunding Alam Bina Sdn Bhd v. Errol Oh & Ors [1999] 2 CLJ 875 HC ***(refd)***
Renault SA v. Inokom Corporation Sdn Bhd & Anor And Other Applications [2010] 5 CLJ 32 CA ***(refd)***
S Pakianathan v. Jenni Ibrahim & Another Case [1988] 1 CLJ 771; [1988] 1 CLJ (Rep) 233 SC ***(refd)***
Syarikat Bekalan Air Selangor Sdn Bhd v. Tony Pua Kiam Wee [2015] 8 CLJ 477 FC ***(refd)***
Tan Sri Dato Vincent Tan Chee Yioun v. Hj Hasan Hamzah & Ors [1995] 1 CLJ 117 HC ***(refd)***
Thiruchelvasegaram Manickavasegar v. Mahadevi Nadchatiram [2000] 5 CLJ 435 HC ***(refd)***

Legislation referred to:
Defamation Act 1957, s. 8
Federal Constitution, arts. 5, 8
Legal Profession (Practice and Etiquette) Rules 1978, rr. 5(a), 31, 32, 33, 46
Legal Profession (Publicity) Rules 2001, r. 5(1)(a)(ii)
Legal Profession Act 1976, ss. 41, 42(1)(b), 47, 56, 57 (c), (j), 64(6), 94, 99(1), 100, 103A, 103B, 103C, 103D

Other source(s) referred to:
Gatley, *Libel and Slander*, 12th edn, p 84

For the plaintiff - Muhammad Shafee Abdullah; M/s Shafee & Co
For the 1st defendant - Michael Yap Chih Hong; M/s Tommy Thomas
For the 2nd defendant - Porres Royan; M/s Kumar Partnership
For the 3rd & 4th defendants - Lambert Rasa-Ratnam, Andrew Chiew Ean Vooi & Kenneth Seet Wan Zheng; M/s Lee Hishammuddin Allen & Gledhill

Reported by Suhainah Wahiduddin

JUDGMENT

Hanipah Farikullah J:

Introduction

[1] This is the judgment following a trial in a defamation action brought by the plaintiff, Tan Sri Dr Muhammad Shafee Abdullah against the defendants.

[2] The action was brought in respect of the motion titled "Motion Against Shafee Abdullah" dated 28 February 2015 ("the motion"). The motion was published by the third defendant on its website.

The Plaintiff's Action

[3] In gist, the plaintiff's causes of action against the defendants are as follows:

(a) An injunction restraining the defendants from moving the said motion in future Annual General Meetings and Extraordinary General Meetings of the third defendant;

(b) For a declaration that the said motion seeking the third and the fourth defendants to condemn and reprimand the plaintiff is *ultra vires* the Legal Profession Act 1976 (LPA) in view that the said motion if adopted by the third and the fourth defendants would usurp the very jurisdiction and powers of the Disciplinary Board of the third defendant under Part VII, in particular, ss. 94, 99, 100, 103A, 103B, 103C and 103D of the Legal Profession Act 1976;

(c) For a declaration that the said motion is *ultra vires* as it is meant to move the defendants to act beyond their statutory power under the LPA thus amounting to a breach of statutory duty;

(d) For a declaration that the said motion if adopted by the third and the fourth defendants is *ultra vires* and a breach of natural justice and the right to a fair hearing;

(e) For a declaration that the said motion to move the third and the fourth defendants during the said AGM is *mala fide*, politically motivated and would breach the plaintiff's constitutional rights under the Federal Constitution, in particular, and *inter alia* arts. 5 and 8 of the Constitution;

(f) General damages;

(g) Damages for libel; and

(h) Damages for tort of conspiracy.

[4] Three substantive defences were advanced by the defendants: justification, qualified privilege and fair comment.

[5] Although there are a number of issues for me to resolve, the case is primarily concerned with the conduct of the plaintiff in his capacity as an advocate and solicitor and also as the *ad hoc* Deputy Public Prosecutor ("DPP"). The case essentially relates to what the plaintiff said as an advocate and solicitor and as the ad hoc DPP at the Kelana Jaya Talk which was recorded in a video and later formed an agreed transcript ("the transcript") and also what the plaintiff said after the judgment of the Federal Court in Sodomy II.

The Parties

[6] The plaintiff, a senior advocate and solicitor of the High Court of Malaya, a member of the third defendant and was an ad hoc DPP was statutorily appointed to represent the Public Prosecutor in *Dato' Seri Anwar Ibrahim v. PP* [2016] 6 CLJ 161 Criminal Appeal No: 05-47-03-2014(W) at the Federal Court (Sodomy II case) and before that in W-05-19-01-2012 at the Court of Appeal.

[7] The first defendant is a senior advocate and solicitor of the High Court of Malaya practising under Messrs Tommy Thomas. The first defendant is the proposer of the motion.

[8] The second defendant is a very senior advocate and solicitor of the High Court of Malaya practising as a consultant under Messrs Skrine & Co and is a seconder for the said motion. He was a former judge at the Court of Appeal, Malaysia.

[9] The third defendant is the statutory body formed under s. 41 of the LPA.

[10] The fourth defendant was the President of the Bar Council of Malaysia at the time when this suit was filed.

[11] The third and the fourth defendants were sued together.

[12] The plaintiff, the second defendant (DW2), the third defendant (DW3) and the fourth defendant (DW4) gave evidence during the trial. A number of people are named in this judgment. Nothing in this judgment should be taken as a finding by me which is adverse to anyone who did not give evidence. None of them (other than PW1, DW1, DW2, DW3 and DW4) has given evidence.

The Background Facts

[13] Before analysing the issues raised in the pleading and the evidence, it is necessary to set out in some detail the relevant background facts relating to the disputes.

[14] On 28 February 2015, the first defendant (the proposer), seconded by the second defendant published and submitted the said motion to the secretary of the third defendant to discuss in 69th Annual General Meeting of the third defendant on 14 March 2015 ("the said AGM"), the alleged misconduct of the plaintiff after Dato' Seri Anwar Ibrahim's ("DSAI") appeal at the Federal Court in "Sodomy II" case.

[15] On 24 February 2015, the notice of an Annual General Meeting of the third defendant ("the said notice") was issued by the third and the fourth defendant.

[16] The motion itself was presented to the third and the fourth defendant on 3 March 2015.

[17] The third and the fourth defendants had received and accepted the motion and published it in writing and by uploading it online on the Bar Council website. The third and the fourth defendants had disseminated the said motion through the means of uploading it onto their website and by hard copies of the motion to members of the Bar.

[18] On 9 March 2015, the plaintiff alleged that the third and the fourth defendants caused to be published the said motion in its entirety with all its intended defamatory meaning on http://www.malaysianbar.org.my titled "Agenda and Motions for the 69th Annual General Meeting of the Malaysian Bar" ("the motion"). It is not disputed that at all material times, http://www.malaysianbar.org.my could be accessed by any members of the third and the fourth defendants.

[19] On 11 March 2015, the plaintiff received the said agenda and motions by hand at his office for the said AGM from the secretary of the third defendant, and enclosed therein was the said motion that the first defendant, seconded by the second defendant intended to move the third and the fourth defendants to adopt as specific agendas for discussion and action.

[20] The motion was never debated at the 69th AGM of the Malaysian Bar due to the *ex parte* interim injunction obtained by the plaintiff.

Issues

[21] The court received full written submissions from the plaintiff and the defendants. The arguments raised the following main issues.

(i) Whether the words are defamatory;

(ii) Whether the fourth defendant has been rightly joined and sued;

(iii) The defence of justification, qualified privilege and fair comment;

(iv) Malice by the defendants;

(v) Whether the defendants acted in breach of statutory duty; and

(vi) Whether the motion is *ultra vires* of the Legal Profession Act.

The Law On Defamation

[22] There is no dispute as to the applicable law on defamation.

[23] In our law on libel, which is governed by the Defamation Act 1957, the burden of proof lies on the plaintiff to show:

(i) the words are defamatory;

(ii) the words refer to the plaintiff; and

(iii) the words were published.

[24] The plaintiff must first discharge the onus of proving that the statements complained of were defamatory of the plaintiff. Only upon the plaintiff establishing this would the burden then rest on both defendants to prove that those statements are in substance and in fact true. (See Supreme Court decisions in *S Pakianathan v. Jenni Ibrahim & Another Case* [1988] 1 CLJ 771; [1988] 1 CLJ (Rep) 233 and *Abdul Rahman Talib v. Seenivasagam & Anor* [1966] 1 LNS 5; [1966] 2 MLJ 66.

[25] Only if these elements are established, then it can be said that *prima facie* the words are defamatory of the plaintiff. Only then would it become necessary to consider the defences and the plaintiff's answers thereto. (See *Nagandran Kalianna Gaundar v. Melinda Alison Monteiro & Ors* [2011] 1 LNS 466 and *Ayob Saud v. TS Sambanthamurthi* [1989] 1 CLJ 152; [1989] 1 CLJ (Rep) 321).

The Motion

[26] The words complained of in this action were published in the motion, which is as follows:

(a) WHEREAS barristers are members of a noble and honourable profession, and are expected to behave honourably all the times;

(b) WHEREAS barristers are prohibited from conducting themselves in any manner which would bring the legal profession into disrepute or which is likely to diminish public confidence in the legal profession;

(c) WHEREAS barristers must not permit their absolute independence and integrity to be compromised nor are they permitted to compromise their professional standards in order to please clients or for any other reason;

(d) WHEREAS in total violation of these long established principles and cherished principles and values, Shafee Abdullah has, from the time the Federal Court delivered its decision to convict Anwar Ibrahim on 10 February 2015, behave in a repugnant and obnoxious manner which has brought the legal profession into disrepute;

(e) WHEREAS since 10 February 2015, Shafee Abdullah, as leading prosecuting counsel, has wilfully and with impunity:

(i) held press conferences condemning Anwar Ibrahim who cannot respond as a convicted prisoner serving time;

(ii) drawn attention to his prowess, allegedly as a top rate prosecutor;

(iii) demeaned the accused Anwar Ibrahim and his legal team and the defences that were relied upon by them in court proceedings;

(iv) given interviews to the traditional and online media concerning the performance as prosecutor; and

(v) organised and participated in nationwide road shows, with a political party, for the purpose of insulting the convicted prisoner and bringing attention to his role in the conviction.

(f) WHEREAS such extreme and outrageous conduct, unprecedented in the annals of the common law, cannot be allowed to continue and must receive strong condemnation from his peers;

(g) WHEREAS a former Attorney General, Abu Talib, was quoted online on 16 and 17 February as stating that Shafee was advertising and promoting himself in the media, and called on Attorney General Gani Patail to revoke Shafee Abdullah's appointment;

(h) WHEREAS "the totality of Shafee Abdullah's conduct since 10 February 2015 has been morally reprehensible and legally unacceptable, crossing all lines of decency".

(i) WHEREAS Shafee Abdullah, although supported by forces of the State, is not above the law, as Lord Denning reminded that Attorney General of the United Kingdom in 1977:

> To every subject in this land, no matter how powerful, I would use Thomas Fuller's words over 300 years ago; 'Be you ever so high, the law is above you';

(j) Shafee Abdullah's conduct is in clear breach of rr. 5(a), 31, 32, 33 and 49 of the Legal Profession (Practice and Etiquette) Rules 1978.

(k) WHEREAS r. 33 of the 1978 Etiquette Rules which reads:

> An advocate and solicitor shall treat adverse witness and parties with fairness and due consideration and shall not minister to the malevolence or prejudices of a client in the conduct of a case

has particularly been breached by Shafee Abdullah.

(l) "Shafee Abdullah has violated the Legal Profession (Publicity) Rules 2001, r. 5(1)(a)(ii) of which prohibits lawyers from publicising about themselves or their practice in any manner "that may reasonably be regarded as being … in bad taste … sensational, intrusive, offensive or in any other way unbefitting the dignity of the legal profession".

ACCORDINGLY, the Malaysian Bar hereby resolves to:

(i) Condemn, in the strongest terms, Shafee Abdullah's behaviour since 10 February 2015;

(ii) Call on the in-coming Bar Council to immediately lodge a complaint against Shafee Abdullah with the Disciplinary Board;

(iii) Urge the Bar Council to take all other steps to prevent Shafee Abdullah from continuing to bring the legal profession into disrepute.

Whether The Words Are Defamatory

[27] There is no dispute between the parties that the motion was referred to the plaintiff. Learned counsel for the plaintiff submitted that the impugned statements in the motion are defamatory towards the plaintiff.

[28] In support of his submission, learned counsel for the plaintiff referred me to a number of authorities (see *Perunding Alam Bina Sdn Bhd v. Errol Oh & Ors* [1999] 2 CLJ 875; [1999] 6 MLJ 101, *Goh Chok Tong v. Jeyaratnam Joshua Benjamin* [1998] 3 SLR 337 and *Mirror Newspapers Ltd v. World Hosts Pty Ltd* [1979] 141 CLR 632).

[29] The natural and ordinary meanings of the impugned statements in the motion submitted on behalf of the plaintiff are as follows:

(i) Looking at the motion as a whole, there is a blatant attack on the actions and character of the plaintiff, especially in his capacity as an advocate and solicitor acting as an ad hoc DPP, allegedly having breached the rules of the Legal Profession Act.

(ii) The natural meaning and ordinary meaning of paragraphs A, B, C and D of the motion clearly implies that the plaintiff is unethical and not an honest lawyer and with no integrity and honour, and behaved in a repugnant and obnoxious manner which has brought the legal profession into disrepute.

(iii) The accusation in para. E of the motion that the plaintiff had demeaned the accused, his legal team and the defences that were relied upon by the accused in Sodomy II case and the plaintiff is not independent, and politically motivated and is an agent of a ruling political party, hired to secure the conviction of the said case. The defendants further accused the plaintiff is in the habit of self-promotion and advertising himself as a top rate prosecutor.

(iv) With regards to para. F, the plaintiff contended that conduct is extreme and outrageous and equating that conduct with stating that nothing like the plaintiff's conduct was ever heard of in the common law annals.

(v) The natural and ordinary meaning of these words in para. H of the motion clearly implies the plaintiff is not a decent person and has no regards for decency.

(vii) The natural and ordinary meaning in para. J implies that the plaintiff has no regards to the Legal Profession (Practice and Etiquette) Rules 1978 and/or its sanctity and that he is guilty of breaching the Rules even before he is heard.

(viii) The plaintiff is in the habit of self-promotion and advertising himself as a top rate prosecutor and the plaintiff is not fit and proper person to be an advocate and solicitor under the Act.

[30] I have carefully perused the impugned statements and I am of the view that the words complained of did indeed bear those meanings as submitted by the plaintiff. A reasonable person reading the impugned statements in question would probably draw the inference that the plaintiff is unfit for his profession. Looking at the motion as a whole, there is an attack on the actions and character of the plaintiff, especially in his capacity as an advocate and solicitor acting as an ad hoc DPP, allegedly having breached the rules of the LPA.

[31] The learned author Gatley on *Libel and Slander*, 12th edn, p. 84 opined as follows:

> … It is defamatory to publish of a solicitor that he has been guilty of "sharp practice" in his profession, or a breach of professional confidence, or other disreputable, dishonest, or incompetent conduct, or that she is "downright crooked", or that he has given his client's case away, or that he has no regard to the interests of his clients, or that he knows no law, but not merely to mistake the date on which he was admitted a solicitor. It is defamatory to say that a solicitor has been struck off the roll, or suspended from practice …

[32] I accept the plaintiff's submission that the natural and ordinary meaning of paras. A, B, C and D of the motion clearly implies that the plaintiff is unethical and not an honest lawyer and with no integrity and honour, and behaved in a repugnant and obnoxious manner which has brought the legal profession into disrepute.

[33] I also accept that the words in para. E of the motion are defamatory in that they suggest that the plaintiff had demeaned the accused, his legal team and the defences that were relied upon by the accused in Sodomy II case and the plaintiff is not independent, and politically motivated. The defendants further accused the plaintiff is in the habit of self-promotion and advertising himself as a top rate prosecutor.

[34] The words in para. F are also defamatory in that they suggest that the plaintiff's conduct was extreme and outrageous and equating that conduct by stating that nothing like the plaintiff's conduct was ever heard of in the common law annals.

[35] The natural and ordinary meaning of the words in para. H of the motion clearly imply that the plaintiff is not a decent person and has no regards for decency.

[36] I also find that the words contained in paras. I and J are defamatory in that they imply that the plaintiff has no regards to the Legal Profession Act (Practice and Etiquette) Rules 1978 and/or its sanctity.

[37] Also that the words contained in para. K are defamatory in that they imply that the plaintiff did not act fairly towards the witness or the adverse party.

[38] I accept that the words complained in para. L are defamatory in that they imply that the plaintiff is in the habit of self-promotion and advertising himself as a top rate prosecutor and the plaintiff is not fit and not a proper person to be an advocate and solicitor under the LPA.

[39] Before coming to the defences of justification, qualified privilege and fair comment advanced by the defendants, it is necessary to consider the issue of *locus* raised by the fourth defendant.

Whether The Fourth Defendant Has Been Rightly Joined And Sued

[40] The fourth defendant was the President of the Malaysian Bar and Chairman of the Bar Council at the material time.

[41] In para. 4 of the statement of claim, the plaintiff averred that the fourth defendant is sued as:

> … the president of the Bar Council and is sued on behalf of all the members of the Bar Council of Malaysia including himself.

[42] It is not disputed that the position of "the President of the Bar Council" does not exist under the LPA.

[43] The fourth defendant submitted that the plaintiff's action should have been directed against the Bar Council and not the fourth defendant in whatever capacity. It was submitted for the fourth defendant that the plaintiff's action is clearly against the wrong party.

[44] It is the plaintiff's position that the Bar Council is similar to the 'EXCO' of a State where it is the enforcement limb of the Malaysian Bar and hence the fourth defendant, the President of the Bar Council is being sued in his representative capacity.

[45] It is necessary to take into account some of the relevant provisions in the LPA. Sections 41, 47, 56 and 57(j) of the LPA read as follows:

Section 41. Establishment of Malaysian Bar

(1) There is established a body corporate to be called the "Malaysian Bar".

(2) The Malaysian Bar shall be a body corporate with perpetual succession and a common seal, and with power subject to this Act to sue and be sued in its corporate name and to acquire and dispose of property both movable and immovable and to do and to perform such other acts as bodies corporate may by law perform.

Section 47. Establishment of Bar Council

(1) For the proper management of the affairs of the Malaysian Bar and for the proper performance of its functions under this Act there shall be a Council to be known as the Bar Council.

(2) The Bar Council shall consist of the following:

(a) the immediate past President and Vice-President of the Malaysian Bar;

(b) the chairman of each State Bar Committee and the members elected to represent each State Bar Committee pursuant to subsection 70(7);

(c) members elected pursuant to s. 50.

[46] Section 56 of the LPA provides:

Section 56. Powers and acts of Bar Council

The management of the Malaysian Bar and of its funds shall be vested in the Bar Council; and all the powers, acts or things which are not by this Act expressly authorised, directed or required to be exercised or done by the Malaysian Bar in general meeting may, subject to this Act or any rules made thereunder or any resolution passed from time to time by the Malaysian Bar in general meeting, be exercised or done by the Bar Council:

Provided that no such resolution of the Malaysian Bar shall invalidate the previous exercise of any powers or the previous doing of any act or thing by the Bar Council which would have been valid if the resolution had not been passed.

[47] Section 57(j) of the LPA further provides:

Section 57. Specific powers of the Bar Council

Without prejudice to the general powers conferred by section 56 or the specific powers to make rules conferred by any other provisions of this Act the Bar Council shall have power -

…

(j) to institute, conduct, defend, compound or abandon any legal proceedings by and against the Malaysian Bar or its officers or otherwise concerning the affairs of the Malaysian Bar and to compound and allow time for payment or satisfaction of any debts due or of any claims or demands made by or against the Malaysian Bar.

[48] In the case of *Mohamad Ramli Abdul Manan v. Lim Chee Wee* [2014] 6 CLJ 168; [2014] 6 MLJ 560, the appellant named the then President of the Malaysian Bar as a respondent in an appeal against a fine imposed by the Disciplinary Board. The High Court struck out the then President of the Malaysian Bar as a party. The Court of Appeal affirmed the decision of the High Court. Aziah Ali JCA (now FCJ) held as follows:

Further, pursuant to s. 42 and 47 of the Act, the only body that may undertake and defend the legal action for and against the Malaysian Bar is the Malaysian Bar, represented by the BC (*Majlis Peguam v. Poh Fook Yuen & Anor* [2012] 6 CLJ 36).

[49] Based on the above reasons, I am of the view that the plaintiff has wrongly joined the then President of the Malaysian Bar as a party.

Justification

[50] I will now deal with the issue of justification pleaded by the first and the second defendants. The defence of justification was considered by the Federal Court in the case of *Syarikat Bekalan Air Selangor Sdn Bhd v. Tony Pua Kiam Wee* [2015] 8 CLJ 477; [2015] 6 MLJ 187. Delivering the judgment of the Federal Court, Azahar Mohamed (FCJ) held as follows:

> [45] This area of law is well settled. As a matter of general rule, the defence of justification is a complete defence to a defamation action (see *Hasnul Abdul Hadi v. Bulat Mohamed & Anor* [1977] 1 LNS 33; [1978] 1 MLJ 75 and *Tun Datuk Patinggi Haji Abdul Rahman Ya'kub v. Bre Sdn Bhd & Ors* [1995] 1 LNS 304; [1996] 1 MLJ 393). The burden is on the defendant to show that the defamatory imputations are substantially true.

[51] Section 8 of the Defamation Act 1957 however, provides that the first defendant is not required to prove that all the words complained of in the motion are true, as long as those that are not proven to be true do not materially injure the plaintiff's reputation. It reads:

> In any action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges.

[52] The effect of s. 8 of the Defamation Act 1957 was also explained by Hepworth J in *Abdul Rahman Talib v. Seenivasagam* [1964] 1 LNS 2; [1965] MLJ 142, where His Lordship stated:

> At common law, under the plea of justification, the defendant must prove the truth of all material statements in the libel. There must be a substantial justification of the whole libel. If any material part were not proved true the plaintiff would be entitled to damages in respect of such part, provided, of course, that it would by itself form a substantial ground for an action for libel. By section 8 of the Defamation Ordinance 1957, however it is now provided that in an action for libel or slander in respect of words containing two or more distinct charges, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation, having regard to the truth of the remaining charges.

[53] Referring to the English case of *Lucas-Box v. News Group Newspapers Ltd* [1986] 1 All ER 177, Azahar Mohamed FCJ in the case of *Syarikat Bekalan Air Selangor Sdn Bhd v. Tony Pua Kiam Wee* (*supra*) states as follows:

A [51] In substance, the *Lucas-Box* plea of justification as decided by the English Court of Appeal is as follows:

(a) if a plaintiff, in its defamation pleadings, gives a natural and ordinary meaning to the impugned words, the defendant may then rely on stating in his defence what he alleged was the
B natural and ordinary meaning of the words complained of; and

(b) a defendant in defamation proceedings who wishes to rely on a plea of justification must make clear in the particulars of justification the case which he is seeking to set up and must accordingly state clearly and explicitly the meaning which he seeks to justify.
C

[54] In this present case, it is observed that the first defendant sought to justify his own pleaded meaning of the impugned words in paras. 16 and 17 of the amended defence.

[55] In seeking to prove the substantive truth of the meaning of the
D impugned words, the second defendant had pleaded in paras. 10 and 11 of its amended defence.

[56] In my view, a perusal of paras. 16 and 17 of the first defendant's amended defence and paras. 10 and 11 of the second defendant's amended defence, show that the first and the second defendants had clearly and
E expressly pleaded the *Lucas-Box* meaning.

[57] It is noted that the first and the second defendants first denied that the impugned words carried any impugned meanings. They then went on to plead that the meanings as set out in the motion were true in substance.

F **[58]** The first and the second defendants went on to plead particulars to support the meaning they gave to the impugned words.

[59] In my view, the first and the second defendants had pleaded with clarity the meaning attributed to the impugned words which were different from the meaning given by the plaintiff. Thus, the plaintiff knew what case
G he had to meet and the meaning, which the defendants sought to attribute to the impugned words.

[60] Essentially, the impugned words as pleaded by the first and the second defendants was that there were grounds for suggesting that there was improper conduct and the plaintiff had breached the relevant rules relating
H to the conduct of an advocate and solicitor.

[61] The first and the second defendants submitted that they have established their defence of justification whereby since 10 February 2015, the plaintiff has:

I

(i) held press conferences condemning the accused in Sodomy II who cannot respond because he was a convicted prisoner serving time;

(ii) drawn attention to his prowess, allegedly as a top rate prosecutor;

(iii) demeaned the accused in Sodomy II case and his legal team and the defences that were relied upon by them in court proceedings;

(iv) given interviews to the traditional and online media concerning his performance as prosecutor;

(v) organised and participated in nationwide road shows, with a political party, for the purposes of insulting a convicted prisoner and bringing attention to his role in the conviction; and

(vi) these nationwide road shows were carried in full page advertisements in the press which also included a photograph of the plaintiff.

[62] In the context of this case, it is important to focus on what primary facts the defendants had adduced in support of their defence in that there was improper conduct and breached of the relevant rules of the LPA by the plaintiff.

[63] In seeking to prove the substantial truth of the motion, the first and the second defendants' case on justification focused on what the plaintiff said after the judgment of the Federal Court in Sodomy II case and particularly what the plaintiff said at the Kelana Jaya Talk.

The Kelana Jaya Talk By The Plaintiff

[64] As I have stated earlier, the transcript of the Kelana Jaya Talk is an agreed document between the parties (See Bundle B1 Tab 23 & B2). The plaintiff spoke clearly and it can be seen from the recording that was played in court.

[65] In reaching this decision, I have taken into account matters referred to below in this judgment. Having viewed the audio-visual recordings and the passage of the transcript of the Kelana Jaya Talk, what the plaintiff was saying in summary are as follows.

The Purpose of The Kelana Jaya Talk - The Plaintiff Alleged Himself To A Political Party

[66] The defendants adduced evidence during the trial that on 17 February 2015 a week after the conviction of the accused in the Sodomy II case, the Akademi Kepimpinan Kapten Hussein ("AKHI") organised a talk titled "Dialog Bersama Tan Sri Muhammad Shafee Abdullah" at Kelana Jaya. AKHI is an institution established by UMNO to nurture a new breed of UMNO Youth leaders, as evident from the following passage of exh. D10:

A Cadangan penubuhan satu akademi khusus untuk pemuda UMNO telah diusulkan dalam ucapan dasar YB Khairy Jamaluddin, selaku Ketua Pemuda UMNO 2012 dan telah dipersetujui oleh YAB Dato' Sri Najib Tun Abdul Razak pada Perhimpunan Agung UMNO tahun berikutnya.

Akademi Kepimpinan Kapten Hussein (AKHI) kemudiannya telah
B ditubuhkan pada 1 Oktober 2014.

[67] Exhibit D11 further elaborated on the mission of AKHI, as follows:

Melatih bakal pemimpin UMNO dengan pendidikan dan nilai politik murni, sejagat dan baru.

C Memaksimakan kebolehan sepenuhnya pemimpin muda UMNO.

Memberi pendedahan kepada pemimpin UMNO akan teori dan aplikasi kepimpinan dalam politik.

[68] The Kelana Jaya Talk was widely advertised as seen from exh. D1 (Tab 45 of Bundle B2), and was open to the public. The Youth and Sport
D Minister and current UMNO Youth chief, Khairy Jamaluddin ("Khairy") was reported by The Malaysian Digest to have tweeted by saying "those taking potshots at him (Shafee) are cordially invited." In another posting *via* Facebook, he stated:

Everyone is invited. To those who type a lot like law professors at FB,
E welcome. Do not just be a keyboard warrior. This is your chance to go face to face with Shafee.

[69] What the transcript demonstrates beyond doubt that the plaintiff gave the leading speech at the Kelana Jaya Talk. The welcoming speech was given by Khairy who explained the purpose of the talk as follows:

F

Saya rasa dalam tajuk yang kita bagi kepada tuan-tuan dan puan-puan pada malam ini … tidak disebut (sic) tajuk itu apa. Cuma dialog dengan Tan Sri Shafee Abdullah. Tetapi saya rasa semua tahu kes mana yang akan dirujuk pada malam ini, kes mana yang akan dikupas pada malam (sic) ini. Dan juga apa yang disampaikan Tan Sri Shafee itu mungkin …
G bukan mungkin, sudah pasti akan merujuk kepada satu kes sahaja. Jadi kalau saudara-saudara datang ke sini dengan niat ingin bertanya tentang kes lain, go back. Kita ke sini untuk bercakap tentang satu kes saja.

[70] Khairy then went on to explain as follows:

H Kenapa kita buat? Kenapa kita insist that we have to explain further what happened and what the judgment was all about? Dia … jawapan dia mudah. Selama enam tahun..for six years … and this was the basis of the defence. The basis of the defence … hujah yang digunapakai oleh defence … ataupun peguam-peguam bela Dato' Seri Anwar was that this was a political conspiracy. Never forget that. This was a political conspiracy dan
I tuduhan itu dibuat terhadap UMNO dan Barisan Nasional.

Jadi apabila digunakan hujah oleh peguambela apabila this was a political conspiracy … jadi as a political party, do you expect us to keep quiet after the judgment is delivered and the final verdict is delivered? Kami tidak

dapat buat apa-apa … for six years we kept quiet. Sebab kami menghormati proses undang-undang. We cannot comment on the case while the case was before the High Court, the Court of Appeal and the Federal Court. We refrained from saying anything. Jadi selama enam tahun secara percuma kita dikritik dan kita dituduh menjadi political mastermind political conspiracy dalam Kes Dato' Seri Anwar Ibrahim.

…

Jadi bagi kita dalam UMNO it is important … amat penting untuk kita menjelaskan sepenuh-penuhnya daripada orang yang paling layak untuk sampaikan penerangan kepada kita … untuk kita lawan tuduhan political conspiracy.

…

Jadi selama enam tahun kita dituduh political conspiracy … konspirasi politik … sampailah hari terakhir dalam Mahkamah Persekutuan peguambela masih tetap menggunakan alasan bahawa this is a political conspiracy. Jadi apabila dah selesai … do not expect us to keep quiet because we have been taking this for six years … inilah masa kita jelaskan dengan kebenaran…kita bawa Tan Sri Shafee untuk bawa kebenaran kepada orang ramai dan jelaskan sepenuhnya tentang kes ini.

[71] Khairy also mentioned that the Kelana Jaya Talk was open to the public and was live-streamed online:

Saya rasa terpanggil sebab ini maruah parti saya. Saya sebagai ketua pemuda … kita buka ruang yang open forum. Malam ini kita tak tapis … yang datang ini bukan semua ahli UMNO, penyokong Barisan Nasional … maybe there will be some hostile questions Tan Sri Shafee … I don't know. I open it to everybody. Dua ratus dalam dewan … seratus diluar … ratusan atau ribuan tengok online streaming kita. Dan kita nak dengar daripada Tan Sri sendiri apa sebenarnya yang berlaku dan juga huraian Tan Sri. I'm sorry this for opposition is uncomfortable. "Okay kes dah selesai, habislah cerita". Well, too bad. You had six years of talking about us … now this is our time to explain our side of story.

[72] In cross-examination, the plaintiff admitted that he advised the organisers the necessity of such forum:

AS : I'm talking about Khairy Jamaluddin who said that this talk was necessary because they needed to answer the issue of political conspiracy. Did you at any time advise him that the forum was completely unnecessary because the Federal Court had made a finding that, in fact, there was no basis to that allegation?

PW1 : I advised the reverse. That the forum was necessary and such forums, not just from UMNO, would be necessary to provide an equaliser, if I may use the word, to all the lies that has been told by the leaders of the Bar. That I was a member of a persecuting team. I had an agenda to correct, because my reputation was affected. Forget about the Attorney General. My reputation was affected that I am a part of persecution team.

[73] It is not a disputed fact that the Kelana Jaya Talk was also reported in some newspapers as The Star, Utusan Malaysia and some online news reports.

Political Conspiracy

[74] The plaintiff in his evidence had explained in court that the Kelana Jaya Talk was necessary to clear the political conspiracy theory on the Sodomy II case advanced by the defence.

[75] In this regard, the plaintiff explained that some quarters of the public have misled the public into thinking that the Federal Court's judgment could not have been supported by evidence. Hence the plaintiff finds it is necessary to explain the details of the evidence.

[76] It is also noted that the plaintiff admitted in cross-examination that the Kelana Jaya Talk was also necessary to defend himself. This is what he said:

> AS : And therefore the forum …
>
> PW1 : Therefore, the forum to me was necessary
>
> AS : So, therefore, are you now telling me, Tan Sri, that your primary aim was not to defend the Federal Court judgment, but to defend yourself?
>
> PW1 : No. My interest and the Federal Court's judgment was consistent, because the Federal Court gave a judgment in my favor, no conspiracy, and I'm saying there's no conspiracy, there's no persecution, but you guys said it is persecution. So by defending myself, I'm defending the Federal Court as well.

[77] I accept the first defendant's position that there was no necessity for the plaintiff to defend the Federal Court's judgment given that it was clear that the Federal Court did not accept the accused's submissions in Sodomy II case that there was a political conspiracy against him. This is what the Federal Court said (see *Dato' Seri Anwar Ibrahim v. PP & Another Appeal* [2015] 2CLJ 145):

> [205] We hold that the Court of Appeal had adopted the right principle in assessing the appellant's statement from the dock. As such we find no merit on the appellant's complaint that the Court of Appeal had seriously misdirected itself in making adverse comments on the appellant's decision to give his statement from the dock. While it is true that it is within the appellant's right to give a statement from the dock, that statement must however amount to a credible defence. A mere denial does not amount to a credible defence. We hold that the defence of political conspiracy remains a mere allegation unsubstantiated by any credible evidence.

[78] It is pertinent to note that the Federal Court's judgment states that the defence of political conspiracy remains a mere allegation not substantiated by credible evidence.

[79] The evidence clearly shows that the Kelana Jaya Talk was organised by a political party. In my view, as an ad hoc DPP at the material time, the plaintiff should not align himself to a political party.

Criticised The Accused In Sodomy II

[80] The plaintiff criticised the accused in Sodomy II case by saying that "I believe he took a cowardly step by giving a statement from the dock".

[81] On this point, in cross-examination the plaintiff gave the following evidence:

AS : That's a personal comment, Tan Sri. A personal attack on the accused.

PW1 : It is not personal. It is in fact very legalistic.

AS : Cowardly is legalistic?

PW1 : Legalistic, because, let me explain. I don't think anyone in this court would disagree that Anwar is the most articulate speaker. He could get out of almost any situation. Statement from the dock is meant for the infirmed mind, people who cannot explain. No matter what they explain, they look guilty. Those are the people who use, who uses statement from the dock like the Adam Rambo situation I defended. The guy was mad, so he gave a statement from the dock. Anwar is certainly not infirmed, certainly not mad. So if he cannot take the witness box after putting Saiful 7 days of harsh cross-examination, what would you describe that? Not cowardly?

AS : But the Court never described him that way?

PW1 : Who cares about what the Court described.

AS : Aaa …who cares about what the Court described.

PW1 : I wanted to describe …

AS : That's exactly the problem we have, Tan Sri. You're not caring what the Court said.

[82] The evidence also shows that the plaintiff criticised the accused in Sodomy II case for not giving his DNA, despite acknowledging that the Federal Court did not do so in its judgment:

AS : In fact, Tan Sri, that is something else not mentioned in the Federal Court judgment, there was no criticism of Dato' Seri Anwar Ibrahim for not giving his DNA. I put it to you.

PW1 : I'm not sure, but I thought there is some mention of it pertaining to Anwar not giving his DNA. I'm not sure.

AS : He was not criticised for it, Tan Sri, I'm saying.

PW1 : Yes.

AS : No court criticised the accused for not giving his DNA.

PW1 : That would be consonant with principles of law.

AS : Yes.

PW1 : Therefore, I would agree.

AS : So? Consonant with principles of law and conduct, practice, I'm putting it to you, Tan Sri, that it was wholly improper for you to have made that statement against the accused?

PW1 : I disagree because my, my conduct …

AS : That's fine.

PW1 : No…that my conduct cannot be judged with a judicial conduct that is expected of a judge. My conduct is a prosecutor, as an advocate & solicitor. They are different.

AS : So what are you saying, Tan Sri? You do not have to abide by the law? Is that what you're saying?

PW1 : No, I'm not saying that. There are certain things a judge may not be able to enter into the arena. For instance, the arena of conflict, but as an advocate or a DPP, I obviously entered into the arena of conflict. I can comment.

[83] With respect, it does not seem to me that calling an accused a "coward" could not in any way be described as a legal analysis of the law. I accept the first defendant's contention that it was a personal attack against a convicted prisoner.

Breach Of The Camera Evidence

[84] The plaintiff had disclosed the *in camera* evidence at the Kelana Jaya Talk. In fact, during the cross-examination, the plaintiff admitted that he went into great detail of the *in camera* evidence at the Kelana Jaya Talk.

[85] This is what the plaintiff admitted during the cross-examination:

AS : You disagree. I'm putting it to you, Tan Sri, that in your talks, in your interviews, you went way outside those three judgments in disclosing the *in camera* evidence.

PW1 : Not way outside but way inside the camera evidence. I went in the greatest of detail.

AS : Oh ya. Ya, you can put it that way. That's even better.

PW1 : Yes.

AS : So you went into great detail about the *in camera* evidence.

PW1 : Yes.

AS : So you were happy to disclose in, what was *in camera* evidence, which you disagree that's *in camera*? You were happy to disclose all of that, publically to the world at large because there were thousands watching this?

PW1 : Yes, I would do it again if I were invited to talk about the Anwar case, I would do it again.

[86] It is observed that at the Kelana Jaya Talk, the evidence that was given *in camera* by Saiful at the Sodomy II trial:

(a) the reason why Saiful allegedly brought KY Jelly along with him;

(b) the position Saiful took when the alleged sodomy took place;

(c) minute details of how the alleged sodomy took place; and

(d) what transpired thereafter.

[87] It is beyond doubt that the plaintiff had divulged to the public the evidence at the Sodomy II trial that was expunged:

AS : 402, now 403, My Lady. Sorry. 402 was from "Encik Karpal Singh", at the bottom of the page. I'll read again, My Lady. It's short.

"Mahkamah …", which part they're asking for expungement. "Mr Karpal Singh … the 8 times … Timbalan Pendakwa Raya agrees the Court can disregard that. The Mahkamah makes an order, that part 8 times will be expunged from the record for reason being that is not part of the charge. Charge is only on one incident so anything else prejudicial to the accused cannot be included. I understand that Subramaniam but Subramaniam is about hearsay evidence. So the 8 times to be expunged from the record." So, Tan Sri, you agree with me, this evidence about happening 8 times, and you said 8 times plus 1 you came to 9, was expunged from the record.

PW1 : In the High Court, yes.

AS : Yes. And therefore, you were not a liberty to disclose that?

PW1 : Well, this was not followed in the Court of Appeal and the Federal Court.

AS : No, I'm talking about you, Tan Sri. There was an order expunging and you were not … yes …

[88] The plaintiff submitted that the *in camera* evidence in the High Court Sodomy II trial was null and void as it was irregular for the accused as opposed to the complainant to seek for such an *in camera* order.

[89] It is important to note that the *in camera* order has not been set aside, nor declared null and void by any of the courts in Sodomy II case. Thus, in my view the plaintiff was accordingly bound to abide by the *in camera* order at all material times.

[90] I accept the submission of learned counsel for the first defendant that the *in camera* evidence may have been openly read out in the courts in Sodomy II case (at the Court of Appeal and the Federal Court), but that does not give the plaintiff the right to divulge the *in camera* evidence at a public forum, in breach of the *in camera* order and his duties as an ad-hoc Deputy Public Prosecutor and an advocate and solicitor.

[91] In my view, an order of the High Court with regards to the *in camera* evidence must be obeyed until it is reversed or set aside. In *Isaacs v. Robertson* [1985] 1 AC 97, Lord Diplock states as follows:

> … the Court of Appeal rejected it, in their Lordships' view correctly, upon the short and well established ground that an order made by a court of unlimited jurisdiction, such as the High Court of Saint Vincent, must be obeyed unless and until it has been set aside by the court. For this proposition Robotham J.A. (Acting) cited the passage in the judgment of Romer L.J. in *Hadkinson v. Hadkinson* [1952] P. 285, 288:
>
> > It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void. 'A party who knows of an order, whether null and void, regular or irregular, cannot be permitted to disobey it…It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null and void - whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question: that the course of a party knowing of an order, which was null and irregular and who might be affected by it was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed.' (Per Lord Cottenham L.C. in *Chuck v. Cremer* (1846) Cooper temp. Cottenham 205, 338.) Such being the nature of this obligation, two consequences will, in general, follow from its breach. The first is that anyone who disobeys an order of the court…is in contempt and may be punished by committal or attachment or otherwise.

The Plaintiff Misquoted Evidence Led At The Sodomy II Trial

[92] The plaintiff told members of the public at the Kelana Jaya Talk that the accused in Sodomy II case treated Saiful "like a sex slave", when there was no evidence of such a term in the Sodomy II trial, and the court never used such words:

AS : Then I go to line, to the next page. My apologise. Next page. At the top. "Now, it's a very loaded statement …", can you see that sentence? "Now, it's a very loaded statement. Why is it loaded?"

PW1 : Line 9, is it?

AS : At the top. Right at the top. "Now, it's a very loaded statement. Why is it loaded? Satu, menunjukkan he is the dominant person and there is a subservient person. He treats him like a sex slave." You agree with me none of that appears in the judgments, those words?

PW1 : Yes.

AS : You agree? Those are all your words?

PW1 : Yes.

AS : "Sex slave" is your word?

PW1 : My word.

AS : Yes.

PW1 : Yes. Otherwise I would have just read the judgment, word for word.

AS : Perhaps that would have been better, Tan Sri.

[93] It emerged from the evidence that the relevant witness never said the following words, as conveyed by the plaintiff to members of the public at the Kelana Jaya Talk:

> Dan seterusnya, dia tanya Saiful ada bawa KY jelly, Saiful kata ada sebab Saiful jawab dia kata dalam Mahkamah, "kalau saya tak bawa, memang teruk saya", sebab KY jelly helps him not to be injured.

[94] The plaintiff also agreed with learned counsel for the first defendant's suggestion that the words were not in the transcripts of the Sodomy II trial:

AS : I am referring to that sentence at line 20 beginning "Saiful kata ada sebab Saiful jawab dia kata dalam mahkamah" and then those words "Sebab KY Jelly helps him not to be injured". I had asked you to establish where in the evidence these words appear.

P : Yes.

AS : These evidence. Have you attempted to do that Tan Sri?

P : Yes, I have done as best as I could. The exact words coming from his mouth, the way I described it in my talk is not there.

AS : It's not in the notes?

P : It's not in the notes but there are other indicators of the same thing.

AS : So I am going to put it to you that those words "Kalau saya tak bawa memang teruk saya sebab KY Jelly helps him not to be injured" are not in the notes. Those words are not in the notes of evidence, as you've confirmed?

P : Uh, …

AS : Those exact words, Tan Sri, I'm not …

P : Those exact words are not here, yes.

AS : And therefore I am putting it to you that you misrepresented that evidence to the public..

P : Uh, no, because the Federal Court said exactly the same thing. The Federal Court in their written judgment said the same thing I said.

AS : But you agree with me, Tan Sri, just one last question that when you say "Saiful kata ada sebab Saiful jawab kata dia dalam mahkamah. Kalau saya tak bawa memang teruk saya". You were alluding to evidence he gave in court. You said, "Saiful kata". You were alluding to evidence…

P : Yes.

AS : Saiful gave in court. Correct?

P : Uh, yes.

[95] In my view, the plaintiff ought to have used more neutral or descriptive terms, like what the Federal Court did in para. 51 of its judgment, instead of describing the evidence as though it was Saiful's.

Criticised The Defence Team

[96] The plaintiff has also criticised the defence team in relation to the Sodomy II case. This is what the plaintiff said in his response to the question from by the floor:

AS : "Okay. Soalan saya sebenarnya dua, tapi tadi, saudara tadi telah bring up tentang, so, saya rasa jadilah tiga sekarang." Erm, and then he introduces himself and his first question is, 'pertama sekali', and this is on the next page My Lady, 37, line 2. "Pertama sekali saya nak tanya Tan Sri, macam mana, apa ingredient utama Tan Sri, untuk, yang dengan colleague, hanya berdua untuk melawan opposition yang mana menampilkan 13 orang peguam untuk membela diri dia seorang. So kalau, kiranya 14 la campur dia (Anwar) sekalilah." And you answered that question at page 38. "Terima kasih", starting at line 1, "Soalan pertama berkenaan dengan 14 peguam lawan satu dalam Mahkamah Persekutuan. Sebenarnya daripada dulu, semenjak saya mula karier saya sebagai Timbalan Pendakwa Raya, bila saya lihat 2 perkara. Satu, bila saya lihat lawan saya

lebih daripada tiga orang, saya dah tahu kes itu saya akan menang. Kalau one-to-one lebih susah. Sebab dia concentrate. Peguam dia akan concentrate, lebih-lebih lagi, peguam itu yang peguam muda, yang will not take any chances. Dia akan leave no stone unturned. Jadi kalau Nampak 14, ini macam cerita too many cooks spoil the broth. This is what happens. Sometimes, one cross examine this way, the other cross examine that way, you know, the whole thing is debunked. So, that is what happened, when you have too many, too many generals in fact, in this particular case, in the defence team, when you have that, the other problem is one is thinking the other is doing the work. In the end, nobody does the work. So one on the other side, one person, he knows he got to know everything, he will do everything, in the end. So that is the reason why I think we performed better. 'So you were praising yourself?

PW1 : No.

[97] It must be noted that the plaintiff had not used general terms in describing the disadvantages of having too many lawyers in the Sodomy II Trial defence team. The plaintiff had further accused the defence team of not doing their work, because each thought the other would be doing the work. With respect, I cannot accept the plaintiff's submission that what he said was a general critique and were not intended to cause ridicule to the members of the defence team.

Events After The Kelana Jaya Talk

[98] The plaintiff during the cross-examination agreed that the talk at a public forum (Kelana Jaya Talk) was unprecedented one.

[99] The events after the public forum at the Kelana Jaya Talk shows that the plaintiff had received public criticisms before the first defendant presented the motion.

[100] The mover (the first defendant) and the seconder (the second defendant) of the motion were not alone. Their concerns were shared, amongst others, by some members of the public such as Abu Talib Othman; Datuk Seri Shaikh Daud and Professor Gurdial Singh Nijar. These facts remain unchallenged by the plaintiff through credible evidence.

[101] The former Attorney General, Abu Talib was quoted online on 16 and 17 February as stating that Shafee was advertising and promoting himself in the media, and called on Attorney General Gani Patail to revoke Shafee Abdullah's appointment.

[102] V Anbalagan (DW2) testified that he accurately reported what was stated by Abu Talib, which evidence was not challenged by the plaintiff.

[103] In fact, during cross-examination, the plaintiff admitted that after the Kelana Jaya Talk, he also gave another talk at Permatang Pauh.

[104] The burden on any defendant seeking to prove justification is to establish the allegation on a balance of probabilities.

[105] Having regard to the above matters, on the defence of justification by the first and the second defendants, I find that there seems to be substantial truth of what had happened at the Kelana Jaya talk as contended by the defendants.

[106] I agree with the defendants that there was nothing out of the ordinary for a concerned member of the Malaysian Bar, like the first defendant and the second defendant to express their opinion on the plaintiff's conduct, particularly when it was of such unprecedented nature, and has an impact on the integrity and dignity of the office of Public Prosecutor.

[107] The unprecedented nature of the plaintiff's conduct was explained by the first defendant in his evidence as follows:

PR : My Lady, I have 2 brief questions. Mr Thomas, in the course of your cross-examination this morning, in answer to a question by my learned friend, Datuk Kamarul, you said that Shafee's conduct was unprecedented in your 40 years of practice. Could you explain what you meant by that?

TT : About the unprecedented nature?

PR : Yes.

TT : Well, My Lady, I guess the best place to start would be the motion itself because I think that captures it. Can I show the motion, I think it's in volume 2, Tab 84. B2, 84. And rather than reading it, can I just say that the totality of his behaviour is set out there. And if I could just summarise it by saying that from a barrister's perspective, we were saying that he did not behave honourably, he was going to bring the profession into disrepute which would diminish public confidence. And then C, I have not mentioned C. I think C is important. There's recital C of the motion. That reminds us that barristers cannot just be instruments of their clients. So there are rules, and the Etiquette Rules, which say that we cannot annoy witnesses, and to accuse witnesses or parties of things which are not supported by evidence, just because the client wants it. So there is an obligation for a barrister to distance himself from his client. He has got to be a bit dispassionate. Those are essentially the things. So far as G is concerned, this was an unusual case in another sense because of Shafee's performance on the fiat, which is very unusual. Because I think statistically, if one looks at the matter, few members of the Bar are invited by the Attorney General either in civil or criminal matters to act on a fiat. So you can

count them on your fingers over 40 years. And this is one of those. So what that meant was that Shafee then assumes the obligations and duties imposed on a DPP, all those duties in addition to the Bar. So, when he is conducting this case and his conduct thereafter, we have to look at it *qua* barrister and *qua* public prosecutor and that is why G is mentioned, Refers to a former Attorney General, Abu Talib. And then the breaches of, if I can now turn to the last page, in particular L. I think L, that rule, out of the Publicity Rules, reminds the profession that any publicity that we carry out, that we cause to happen, must not be done in bad taste or it mustn't be sensational. It mustn't be offensive. Those kinds of general words. And it was my position when drafting the motion that all those things had happened. At least at a *prima facie* level. Those things. And that was unprecedented, because whether in civil law or criminal law, regardless of the litigant, no barrister has undertaking … undertaken such a course of conduct. And the reason…you can't have one rule for one member of the Bar, however distinguished he may be, and another rule for the 15,000 members of the Bar. We have to have a common rule. And what I was concerned about was that if barristers, winning barristers …

AS : Sorry, sorry. My apologies.

TT : Let's take the winning barristers. If barristers who win their cases do this, then inevitably they end up praising the judgment, and talking about it. Of course, if you allow winning barristers to talk about their cases, then losing barristers will talk about their cases. And that's even more dangerous. Barristers who have lost their cases who unfortunately have to criticise the judgment, which may then cross the line of decency. So the publicity provisions are as such that barristers should just not talk about their case. Period. So it's unprecedented.

[108] In conclusion, I find in the first and the second defendants' favour on the defence of justification.

Qualified Privilege

[109] I turn to consider the plea of qualified privilege.

[110] The first and the second defendants contended that the conduct of one of its members and/or was a matter of public interest involving the legal profession, the office of the Public Prosecutor and the administration of justice. Not only was there an existing relationship between the first defendant and the Malaysian Bar, they also shared a common or corresponding interest in the subject matter of the motion, *viz.* the conduct of a member of the Malaysian Bar.

[111] Learned counsel for the first defendant submitted that the words complained of were comments on the following matters of public interest:

(a) the propriety or otherwise of the conduct of a member of the legal profession who had been appointed as ad-hoc DPP in the Sodomy II appeal, of his conduct subsequent to the judgment of the Federal Court while the accused was serving sentence and had no means of defending himself;

(b) the manner in which the plaintiff, subsequent to the judgment of the Federal Court, discussed the evidence in the case including evidence *in camera* and other extraneous matters in the public domain and inviting discussion;

(c) the manner in which the plaintiff described his role as a DPP;

(d) the manner in which the plaintiff demeaned the defences relied upon by legal team in Sodomy II case; and

(e) the effect of the plaintiff conduct on the legal profession, the office of the Public Prosecutor and the administration of justice.

[112] The test of whether an occasion attracts qualified privilege can be found in the decision of our Supreme Court in *S Pakianathan v. Jenni Ibrahim & Another Case* [1988] 1 CLJ 771; [1988] 1 CLJ (Rep) 233; [1988] 2 MLJ 173. Wan Hamzah SCJ, in delivering the judgment of the court, stated:

> However, there are occasions upon which, on grounds of public policy and convenience, a person may, without incurring legal liability, make statements about another which are defamatory and in fact untrue: *Watt v. Longsdon* [1930] 1 KB 130. These occasions are called occasions of qualified privilege. A communication made *bona fide* upon any subject matter in which the party communicating has an interest, or in reference to which the has a duty, is privileged, if made to a person having a corresponding interest or duty although it contains a criminatory matter which, without this privilege, would be slanderous and actionable: *Harrison v. Bush* (1885) 5 E & Be 344; 119 ER 509. The duty may be legal, social or moral, and the person to whom the communication is made must have a corresponding interest or duty to receive it. The reciprocity is essential: *Adam v. Ward* [1917] AC 309 334.

[113] In the English Court of Appeal decision in *Kearns v. General Council of the Bar* [2003] 1 WLR 1357, the English Bar, as a result of unverified information received from a member of the Bar, wrote to all members of the Bar informing them of its mistaken belief that the plaintiffs were not solicitors, and is accordingly not allowed to instruct counsel. The plaintiffs sued the Bar for libel. Summary judgment was thereafter entered against the plaintiffs on the basis that the Bar's plea of qualified privileged succeeded.

The plaintiffs appealed to the Court of Appeal. In dismissing the appeal, Simon Brown LJ observed that the law should more readily attach qualified privilege to communications within an existing relationship than to those of strangers. He stated:

> The argument, as it seems to me, has been much bedevilled by the use of the terms "common interest" and "duty-interest", for all the world as if these are clear-cut categories and any particular case is instantly recognisable as falling within one or other of them. It also seems to me surprising and unsatisfactory that privilege should be thought to attach more readily to communications made in the service of one's own interests than in the discharge of a duty-as at first blush this distinction would suggest. To my mind an altogether more helpful categorisation is to be found by distinguishing between, on the one hand, cases where the communicator and the communicatee are in an existing and established relationship (irrespective of whether within that relationship the communications between them relate to reciprocal interests or reciprocal duties or a mixture of both) and, on the other hand, cases where no such relationship has been established and the communication is between strangers (or at any rate is volunteered otherwise than by reference to their relationship). This distinction I can readily understand and it seems to me no less supportable on the authorities than that for which Mr Caldecott contended. Once the distinctions is made in this way, moreover, it becomes to my mind understandable that the law should attach privilege more readily to communications within an existing relationship than to those between strangers. The latter present particular problems. I find it unsurprising that many of the cases where the court has been divided or where the defence has been held to fail have been cases of communications by strangers.

[114] The first ingredient for the defence of qualified privilege is whether the occasion which caused the defendants to submit the motion and the subsequent publication of the same was a qualified occasion. The answer to this question, in turn depends on whether the defendants have an interest or duty, legal or social or moral to submit the motion to the AGM.

[115] In my view, the answer is in affirmative.

[116] I find that based on the facts and circumstances of this case, the first defendant and the second defendant, a senior member of the Bar, had an interest to present the motion to the Malaysian Bar and the Malaysian Bar had an interest to receive it as it concerns the conduct of one of its members.

[117] The first defendant in this case has made reference to 88 media articles and produced them at the trial. The plaintiff never denied the content of the articles. Since the first defendant is not a journalist, he had drafted the motion based on the newspapers reports.

[118] Based on the principle of *Adam v. Ward* which has been followed in a number of cases in Malaysia, the first defendant and the second defendant, a senior member of the Bar, have an interest or a duty, legal or social moral duty to submit the motion to the Malaysian Bar.

[119] With regards to the plaintiff's contention that the third and the fourth defendants have no duty to receive the motion that concerns the conduct of its member, with respect I cannot agree.

[120] Pursuant to s. 64(6) of the LPA, in my view the third defendant and the fourth defendant (the Bar Council) has a duty to accept it.

[121] In my view, there is no merit in the plaintiff's contention that the third and the fourth defendants have no duty to receive the motion that concern the conduct of its member. The Federal Court in *Lembaga Tatatertib Peguam-Peguam v. Hoo Lin Coln & Anor* [2008] 4 CLJ 317 had decided that Malaysian Bar "is the guardian of professional conduct and etiquette of advocates and solicitors. Augustine Paul FCJ (as he then was), in delivering the majority judgment of the court, observed:

> It is therefore clear that it is the Bar Council that has been entrusted with the duty of maintaining the standard and conduct of advocates and solicitors and not the DB. It acts on its own motion in cases involving misconduct under s. 94 of the LPA. In other cases warranting disciplinary action the DB acts on complaints made to it by, *inter alia*, the Bar Council. It is thus beyond doubt that the Malaysian Bar is the guardian of professional.

Malice

[122] The only issue for me to resolve on the defence of qualified privilege is whether or not the plaintiff has proved on the balance of probabilities, that the first and the second defendants were malicious in drafting and seconding the motion.

[123] Learned counsel for the plaintiff in his submission, relies on a number of reasons to support malice including:

(i) First, no attempt to verify the information. The first defendant had stated that he had come to the conclusions that he put in his motion solely by the media articles.

(ii) Second, the evidence of DW2 that he was annoyed with the Bar Council for not lodging a report *via* the mechanisms of the LPA.

(iii) Third, DW3 gave evidence that if the Bar had at that point of time already lodged a complaint on the plaintiff, he would have dissuaded DW1 from proposing the motion in that case.

(iv) Fourth, if what the Bar Council wanted to do was to stop the alleged conduct of the plaintiff, they could have resorted to an injunction *via* a civil suit *via* the proper mechanism of the court's process. Instead, they have chosen the motion to create maximum publicity and draw negative attention onto the plaintiff.

(v) Fifth, pre-determination of the 'would be' complaint at the AGM. It would be a pre-determination on the alleged misconduct of the plaintiff and therefore placing any possible hearing before the Disciplinary Board of the third defendant nugatory and prejudicial and unfair to the interest of the plaintiff.

[124] What constitutes malice to defeat qualified privilege is best explained by Viscount Dilhorne and Lord Diplock in the decision of the House of Lords in *Horrocks v. Lowe* [1975] AC 135. Viscount Dilhorne said:

> Can a man who believes what he says on a privileged occasion to be true and which if true would not be an abuse of the occasion be held to have made his statements "recklessly whether they are true or false"? Gross and unreasoning prejudice may have led him to have uttered them recklessly whether they were true or false, but if he believes the truth of what he said, can he at the same time be said to be reckless of the truth or falsity of his statements? May be that others with more judgment and more wisdom would not have formed the same belief, but if, in fact, he believes what he says, he cannot at the same time, in my opinion, be reckless whether it is true or false. Such recklessness falls short of deliberate falsehood. But such recklessness, not minding or caring whether it be true or false, whether it arise from anger or unreasoning prejudice, or from some other cause, is not consistent with belief in the truth of the statement.
>
> …
>
> While it is true that a man may believe in the truth of what he says and yet be reckless whether his belief is well founded or not, recklessness whether the beliefs is well founded, while relevant to the question whether the defendant believed what he said, is not, if the defendant in fact believed, evidence of malice. If it were, then the man who honestly and out of a sense of duty made observations based on information found to be inaccurate or incorrect would have his freedom of speech on a privileged occasion unduly restricted.
>
> …
>
> To that, the belief of the respondent was, in my opinion, a complete answer … For a man who honestly believes what he says may yet be actuated by malice and such malice may be established by other evidence than the inference to be drawn from the falsity of the statement. It is that inference which is negatived by belief.

[125] If I may add, with regards to the issue of malice, in the case of *Hughes v. Risbridger (sued as "Bill Risbridger") & Another* [2010] EWHC 491 (QB) Eady J states as follows:

> Findings of malice are extremely rare, in my experience, not least because they are tantamount to findings of dishonesty. It is clear from the exposition of the law by Lord Diplock in *Horrocks v. Lowe* [1975] AC 135, 150-151, [1974] 1 All ER 662, 72 LGR 251, that malice is to be carefully distinguished from other states of mind such as carelessness, excessive zeal, pig-headedness, stupidity, or a failure to arrive at rational conclusions. In practice, a Claimant has to demonstrate that the words were published without any honest belief in their truth or that the Defendant was genuinely indifferent to their truth or falsity.

[126] It emerged from the evidence that the first defendant presented the motion to bring to the attention of the general body of the Malaysian Bar about the plaintiff's conduct, which required urgent attention and action of the Malaysian Bar and the Bar Council.

[127] The evidence also shows that this concern was also shared by the second defendant, who seconded the motion out of the same concerns as the first defendant. The second defendant's evidence-in-chief was to effect that he "was appalled by Tan Sri Dr Muhammad Shafee Abdullah's startling conduct, after the Federal Court's decision in Anwar's appeal was delivered, as reported in the media" and "was also of the respectful opinion that members of the Malaysian Bar should be alerted to the fact that it would appear that neither the Bar Council nor the relevant Bar Committee had taken any action in respect of the startling conduct of Tan Sri Dr Muhammad Shafee Abdullah."

[128] On this issue, I also find that the plaintiff has failed to prove who distributed the motion to the press before the plaintiff received the notice.

[129] Even though I find the impugned statements in the motion are defamatory of the plaintiff, in my view the first and the second defendants are entitled to roll on the defence of qualified privilege.

[130] The defence of qualified privilege can only be defeated by proof of act and malice on the part of the defendants in making the statement of which the complaint was made. The onus of proving such malice is on the plaintiff. Based on the above reasons, in my view, the plaintiff has not discharged their onus.

[131] I find that the defendants have established that the motion was made "on an occasion where the person who makes a communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it" – (See: *Adam v. Ward* [1917] AC 309 at 334.

Fair Comment

[132] I turn to the plea of fair comment.

[133] The ingredients of fair comment are summarised by Lord Ackner in the decision of the Privy Council in *Goh Chok Tong v. Jeyaretnam* [1998] 3 SLR 337, as follows:

> Lord Hooson did not criticise the judge in his statement of the four elements which the defendant had to establish, in order to succeed in his defence of fair comment. These he stated as follows:
>
> (i) The words complained of are comments, although it may consist or include inference of facts; (ii) the comment is on a matter of public interest; (iii) the comment is based on facts; and (iv) the comment is one which a fair-minded person can honestly make on the facts proved.
>
> As regards (ii) above, it was not contested that the comment, if it was a comment and not an assertion of fact, was on a matter of public interest. Their Lordship accordingly deal *seriatim* with elements (i), (iii) and (iv).

[134] As to the defence of fair comment, I have no doubt that the subject matter of the motion was a genuine matter of public interest. Furthermore, as I have said earlier, the sting of the defamation relates to the effects of the plaintiff's conduct on the legal profession, the office of the Public Prosecutor and the administration of justice.

Conspiracy To Defame

[135] The plaintiff alleged in its amended statement of claim that the defendants conspired to defame him.

[136] It was contended for the plaintiff that the acts of all of the defendants were done with full knowledge that the motion was clearly a pre-determination of the result aimed for by all of the defendants when they lodged the complaint against the plaintiff with the Disciplinary Board and the defendants had the malicious intention to injure, denigrate and vilify the plaintiff to achieve the outcome of lowering and destroying the plaintiff's reputation, legal career and practice.

[137] In support of his contention, learned counsel for the plaintiff relied on the case of *Thiruchelvasegaram Manickavasegar v. Mahadevi Nadchatiram* [2000] 5 CLJ 435 and *Tan Sri Dato Vincent Tan Chee Yioun v. Hj Hasan Hamzah & Ors* [1995] 1 CLJ 117; [1995] 1 MLJ 39.

[138] Nevertheless, I have come to the conclusion that the plaintiff failed to expressly put to the defendants' witnesses on the issue of conspiracy when they are under cross-examination.

[139] Hence, I accept the plaintiff's submission that a failure in this respect may be treated as an abandonment of the pleaded statement and the plaintiff therefore, is barred from raising it in his submission.

Conspiracy To Injure

[140] The plaintiff alleged that the defendants conspired to injure him.

[141] This area of law is well settled. In *Renault SA v. Inokom Corporation Sdn Bhd & Anor And Other Applications* [2010] 5 CLJ 32, the Court of Appeal held as follows:

> In regard to the tort of conspiracy, the following need to be satisfied at this interlocutory stage:
>
> (a) an agreement between two or more persons (that is an agreement between Tan Chong and others);
>
> (b) an agreement for the purpose of injuring Inokom and Quasar;
>
> (c) that acts done in execution of that agreement resulted in damage to Inokom & Quasar;
>
> (d) damage is an essential element and where damage is not pleaded the statement of claim may be struck out.
>
> It is clear that the very first element to be shown must be an agreement between two or more persons for the purpose of injuring Inokom and Quasar. 'Agreement' is not limited to a signed and sealed agreement but any informal agreement, including a combination of efforts of the alleged co-conspirators. After that, it has to be shown or at least alleged that acts were done in execution of that agreement which resulted in damage to Inokom and Quasar. In this case, the acts done would have to be unlawful, namely, the alleged false representation made by Renault to Inokom and Quasar as to the level of investment Inokom and Quasar will have to make for the Kangoo project.
>
> It is trite law that the agreement to injure must come first (in other words the agreement should have crystallised), before the alleged unlawful acts are done in execution or pursuant to the agreement.

[142] On this issue, the first and the second defendants contended that the plaintiff has not pleaded any particulars of conspiracy, the agreement and the acts done in execution of the agreement which resulted in injuring him.

[143] In response, it was argued for the plaintiff that direct evidence is not necessary to prove the tort, it may be established by inference evidence.

[144] It is trite law that in a claim of conspiracy, the plaintiff must plead and prove an agreement or arrangement between two or more defendants to injure the plaintiff. It is noted that the only averments of conspiracy are in paras. 8 and 9 of the amended statement of claim. However, no particulars

have been provided in the said pleading as to how the first defendant conspired with the second defendant and the third and fourth defendants to injure the plaintiff.

[145] It is also pertinent to note that not a single question was put to the defendants' witnesses with regard to the alleged conspiracy. Further, it was not mentioned in the plaintiff's evidence in chief that there was a conspiracy involving the defendants against him and if so, how it was achieved.

[146] I find that there was not a shred of evidence, primary or inferred, that the second defendant had, pursuant to an agreement or arrangement with the other defendants intended to injure the plaintiff.

[147] Based on the above reasons, the plaintiff failed to prove the proof that the defendants conspired to injure the plaintiff.

Whether The Defendants Acted In Breach Of Statutory Duty/The Motion Is *Ultra Vires* Of The Legal Profession Act

[148] The plaintiff alleged that the first and the second defendants acted in breach of statutory duty, by failing to resort to the avenue provided for in the LPA in lodging a complaint against him, and in failing to comply with the requirements of s. 99(1) of the LPA, which reads:

> Any complaint concerning the conduct of any advocate and solicitor or of any pupil shall be in writing and shall in the first place be made or referred to the Disciplinary Board which shall deal with such complaint in accordance with such rules as may from time to time be made under the provisions of this Part.

[149] It was submitted for the plaintiff that the conduct of the defendants by using the said motion is a tool to find him guilty of misconduct through the AGM as a platform to accomplish what the Disciplinary Committee and the Disciplinary Board are empowered to do by a specific mechanism provided by the LPA is clearly an attempt to act *ultra vires*. The plaintiff relied on the case of *Majlis Peguam Malaysia & Ors v. Raja Segaran Kirshnan & Other Appeals* [2004] 4 CLJ 239; [2005] 1 MLJ 15, *DP Vijandran v. Majlis Peguam* [1996] 1 CLJ 23; [1995] 3 MLJ 576 and *DP Vijandran v. Majlis Peguam* [1995] 2 CLJ 815; [1995] 2 MLJ 391.

[150] Learned counsel for the plaintiff also argued that the said motion if passed would expose the plaintiff to the risk of being found guilty of misconduct and of being condemned in the harshest terms at the AGM which would ultimately involve a loss of reputation and loss of 'livelihood' within the context of art. 5 of the Federal Constitution.

[151] It is noted that the purpose of the motion does seek to:

(i) condemn, in the strongest terms, the plaintiff's behaviour since 10 February 2015;

A (ii) call upon the in-coming Bar Council to immediately lodge a complaint against the plaintiff with the Disciplinary Board; and

(iii) urge the Bar Council to take all steps to prevent the plaintiff from continuing to bring the legal profession into disrepute.

B **[152]** I am persuaded by the defendants' contention that the fact that the motion calls upon in-coming Bar Council to lodge a complaint against the plaintiff with the Disciplinary Board shows clearly that the AGM is not the disciplinary authority and the disciplinary process does not take place at the AGM. The disciplinary proceeding process as enunciated by the Act would C only commence upon the lodgment of that complaint by the Disciplinary Board.

[153] It must be stressed that the evidence clearly shows that the third and the fourth defendants (the Bar Council) were receiving the motion pursuant to s. 64(6) of the LPA which stipulates that any motion to be considered at D the AGM of the Malaysian Bar shall be served on the secretary of the Malaysian Bar.

[154] In my view, the motion concerns the misconduct of an advocate and solicitor is different from suggesting that the motion is meant to discipline the plaintiff.

E **[155]** I agree with the defendants' submission that had the motion been presented, debated and passed at the 69th AGM, it would not have resulted in any sanction against the plaintiff for "misconduct" under s. 94 of the LPA. All that would have occurred, was the Bar Council proceeding to lodge a complaint against the plaintiff, thereby commencing the disciplinary process F under Part VII of the LPA.

[156] Further, if the motion sought to "convict" and usurp the disciplinary powers of the Disciplinary Board, it would have been wholly unnecessary for the motion to call upon the in-coming Bar Council to immediately lodge a complaint against the plaintiff.

G

[157] It is pertinent to note that when the motion is presented to the AGM, the third and the fourth defendants could not take any action to discipline the plaintiff.

[158] Section 42(1)(b) of the LPA provides that the purpose of the H Malaysian Bar shall be:

(1) (b) to maintain and improve the standards of conduct and learning of the legal profession in Malaysia

[159] Section 57(c) set out the specific power of the Bar.

I (c) to take cognizance of anything affecting the Malaysian Bar or the professional conduct of its members and to bring before any general meeting of the Malaysian Bar any matter which it considers material

> to the Malaysian Bar or to the interests of the profession and to make any recommendations and take any action as it considers fit in relation thereto.

[160] I accept the defendants' contention that s. 57 is a specific section to allow the Bar Council to take cognisance *inter alia* of the professional conduct of its member and to bring before any general meeting of the Malaysian Bar any matter which it considers material to the Malaysian Bar or to the interests of the profession and to make any recommendations and take any action as it considers fit in relation thereto.

[161] It is important to note that the evidence adduced during trial shows that the plaintiff's conduct was a concern to the members of the public.

[162] Raus Sharif (PCA) delivering the Federal Court decision in *Bar Malaysia v. Index Continent Sdn Bhd* [2016] 2 CLJ 545; [2016] 1 MLJ 445 held that:

> A purposive interpretation that promotes the purpose behind the enactment of the aforesaid provisions must be accorded or otherwise that would create an absurd situation that would defeat the appellant's statutory purpose to protect the public including the members of the Bar from violations of the LPA.

[163] In my view, the third and the fourth defendants have not acted *ultra vires* of the LPA and the plaintiff has failed to prove that the defendants have breached their statutory duties under the LPA.

Conclusion

[164] For all these reasons, the plaintiff's claim is dismissed.

[165] By consent, neither party asked for cost.